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Attorneys for Plaintiff
JOBY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDL

JOBY, INC.,

Plaintiff,

v.

TOCAD AMERICA, INC.,

Defendant.

Case No. _____

**COMPLAINT FOR TRADE DRESS
INFRINGEMENT; UNFAIR
COMPETITION AND FALSE
DESIGNATION OF ORIGIN;
CALIFORNIA STATUTORY UNFAIR
COMPETITION; CALIFORNIA
STATUTORY FALSE ADVERTISING;
AND CALIFORNIA COMMON LAW
UNFAIR COMPETITION**

DEMAND FOR JURY TRIAL

Plaintiff Joby, Inc. ("Joby") hereby avers for its Complaint against Defendants ToCAD America, Inc. ("Tocad") as follows:

PARTIES

1. Plaintiff Joby, Inc. f/k/a Joby Design, Inc., is a California corporation with its principal place of business at 1535 Mission Street, San Francisco, California 94103.

2. On information and belief, defendant Tocad is a Delaware corporation with its principal place of business at 53 Green Pond Road, Ste 5, Rockaway, New Jersey 07866.

JURISDICTION

3. Joby files this action against Tocad for trade dress infringement, false designation of origin and unfair competition under the Lanham Act (15 U.S.C. § 1051, *et seq.*), and for a related claims of statutory unfair competition and false advertising under of the laws of the State of California and California common law unfair competition. This Court has subject matter jurisdiction of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a) and (b), and 1367. In addition, because there is complete diversity among the parties and because the amount in controversy well exceeds \$75,000, exclusive of interest and costs, the Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332(a).

4. Joby avers upon information and belief that Tocad has committed the acts complained of within the Northern District of California. Joby further avers upon information and belief that Tocad engages in substantial business within this District, including promoting its infringing product to customers in this District, and that this business and other activity would constitute sufficient contact with this District to subject Tocad to personal jurisdiction within this District.

VENUE

5. Because Tocad is subject to personal jurisdiction in the Northern District of California by virtue of the acts averred upon information and belief in paragraph 4, venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b).

INTRADISTRICT ASSIGNMENT

6. This action is properly assigned to the San Francisco Division of the United States District Court for the Northern District of California because Tocad's wrongful acts have damaged, and will continue to damage, Joby at its principal place of business in the City and County of San Francisco and because those wrongful acts are occurring in, and will continue to occur in, among other locations, the County of San Francisco, and are directed against Joby's intellectual property situated in the County of San Francisco.

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JOBY'S GORILLAPOD® TRIPOD AND TRADE DRESS

7. Joby is, and for many years, has been, engaged in the design, development, manufacture, marketing, and sale of a flexible camera tripod called the "Gorillapod®." Joby sells the Gorillapod® in interstate commerce throughout the nation, including in this judicial district.

8. Joby uses a distinctive design for the Gorillapod®. Joby has consistently used this design in interstate commerce since early 2006. Through such use, and through Joby's marketing and promotional efforts, the Gorillapod® design has come to be associated with Joby and/or with the Gorillapod® brand. Joby's distinctive design includes, but is not limited to the non-functional aspects of multiple rounded segments (or "balls") appearing in a "chain," "string" or series arrangement for each leg of the tripod, with each segment having a ring around the middle. Representative images of the Gorillapod® design are attached hereto as Exhibit A.

9. Joby, its distributors and its retailers have spent approximately \$1 million since early 2006 to market, advertise and otherwise promote the Gorillapod®, including its distinctive design, in interstate commerce. Virtually all of Joby's marketing and advertising of the Gorillapod® have used the distinctive Gorillapod® design described above.

10. As a result of the consistent use by Joby of the Gorillapod® design since early 2006 and Joby's extensive marketing, advertising other promotion of the tripod, all in interstate commerce, the Gorillapod® has become well known and recognized by purchasers by its distinctive design.

TOCAD'S FLEXIBLE CAMERA TRIPOD

11. Upon information and belief, Tocat is also engaged in the design, development, manufacture, marketing, and sale of flexible camera tripods. Tocat manufactures, markets and sells flexible camera tripods called the "FlexPod" and the "FlexPod Plus" (collectively, "FlexPod"), which is a knock-off of Joby's Gorillapod®. Tocat markets and sells the FlexPod in competition with Joby's Gorillapod®. Joby's Gorillapod® and Tocat's FlexPod are distributed in common channels in interstate commerce.

12. Upon information and belief, Tocat has attempted to increase its sales of the FlexPod by using a design that is confusingly similar to Joby's Gorillapod® design. Upon

information and belief, Tocat has marketed, advertised, promoted, offered for sale and sold, and will continue to market, advertise, promote, offer to sell and sell the FlexPod with the intent to benefit from Joby's reputation, to deceive purchasers as to the source, origin, affiliation or sponsorship of the FlexPod, and to profit from consumer demand for and the goodwill built up in Joby's Gorillapod® and its design. A representative image of the FlexPod Plus is attached hereto as Exhibit B, and a representative image of the FlexPod is attached hereto as Exhibit C.

13. Upon information and belief, Tocat and/or its distributors have used an image or images of Joby's Gorillapod® in advertisements and promotions of the FlexPod.

14. Purchasers of Joby's Gorillapod® have been, and are currently being, confused by Tocat's use of Gorillapod®'s design.

FIRST CLAIM FOR RELIEF

(Trade Dress Infringement and False Designation of Origin, Lanham Act)

15. Paragraphs 1 - 14 above are hereby incorporated by reference as if fully set forth this in this claim.

16. Joby's Gorillapod® trade dress is inherently distinctive and/or has acquired secondary meaning.

17. Joby's Gorillapod® trade dress is non-functional.

18. Joby has used the Gorillapod® trade dress in connection with its flexible camera tripod since significantly prior to Tocat's first use of its trade dress for its FlexPod tripods.

19. Tocat uses the FlexPod trade dress for the same type of products for which Joby uses its Gorillapod® trade dress. Tocat's FlexPod trade dress is so similar to Joby's distinctive Gorillapod® trade dress as to be likely to cause confusion, mistake or deception among purchasers, users and the public as to the source, origin, sponsorship or quality of goods, and is likely to confuse the public into believing that Joby is the source or sponsor of Tocat's goods and services, thereby causing loss, damage and injury to Joby and to the purchasing public.

20. Tocat knew, or by the exercise of reasonable care should have known, that its adoption, commencement of use in commerce and continuing use of the Gorillapod® trade dress

1 in connection with its flexible camera tripod would cause confusion, mistake, or deception among
2 purchases, users and the public.

3 21. Upon information and belief, Toca knew of Joby's prior use of the Gorillapod®
4 trade dress, and by adopting, commencing to use, and continuing to use the Gorillapod® trade
5 dress, Toca intended to and did induce and intends to and will induce customers to purchase its
6 flexible camera tripod products by trading off the extensive goodwill built up by Joby in its
7 Gorillapod® trade dress.

8 22. Upon information and belief, the foregoing conduct by Toca has been knowing,
9 deliberate, willful, intended to cause confusion, or to cause mistake or to deceive, and in disregard
10 of Joby's rights.

11 23. The foregoing actions of Toca violate Joby's rights under Section 43(a) of the
12 Lanham Act, 15 U.S.C. § 1125(a).

13 24. Toca's wrongful conduct, as averred above, has permitted and will permit it to
14 make substantial sales and profits on the strength of Joby's nationwide marketing, advertising,
15 sales and consumer recognition. Joby seeks an accounting of Toca's profits, and requests that
16 the Court grant Joby three times that amount in the Court's discretion.

17 25. As a direct and proximate result of Toca's wrongful conduct, as averred above,
18 Joby has been and will be deprived of substantial sales of its flexible camera tripods in an amount
19 as yet unknown but to be determined at trial, and has been and will be deprived of the value of its
20 Gorillapod® trade dress as a commercial asset, in an amount as yet unknown but to be
21 determined at trial. Joby seeks its actual damages, and requests that the Court grant Joby three
22 times that amount of its actual damages in the Court's discretion.

23 26. Joby has no adequate remedy at law for Toca's continuing violation of its rights
24 as set forth above. Joby seeks preliminary and permanent injunctive relief.

25 27. Pursuant to 15 U.S.C. § 1118, Joby asks the Court for an order forcing Toca to
26 deliver up for destruction all labels, signs, prints, advertisements, and other materials in the
27 possession of Toca that infringe upon Joby's rights.

28 ///

SECOND CLAIM FOR RELIEF**(Unfair Competition, Lanham Act)**

28. Paragraphs 1 - 27 above are hereby incorporated by reference as if fully set forth this in this claim.

29. Tocad's conduct, as averred above, includes the making of false or misleading representations or statements of fact that are likely to cause confusion, mistake or deception among purchasers, users and the public as to the source, origin, sponsorship or quality of goods, and is likely to confuse the public into believing that Joby is the source or sponsor of Tocad's goods and services, thereby causing loss, damage and injury to Joby and to the purchasing public.

30. Tocad knew, or by the exercise of reasonable care should have known, that its adoption, commencement of use in commerce and continuing use of the Gorillapod® design in connection with its flexible camera tripod would cause confusion, mistake, or deception among purchases, users and the public.

31. Upon information and belief, Tocad knew of Joby's prior use of the Gorillapod® design, and by adopting, commencing to use, and continuing to use the Gorillapod® design, Tocad intended to and did induce and intends to and will induce customers to purchase its flexible camera tripod products by trading off the extensive goodwill built up by Joby in its Gorillapod® design.

32. Upon information and belief, the foregoing conduct by Tocad has been knowing, deliberate, willful, intended to cause confusion, or to cause mistake or to deceive, and in disregard of Joby's rights.

33. By its use of Joby's Gorillapod® design in connection with its flexible camera tripods in advertisements and promotions, Tocad has engaged in acts which constitute unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

34. Tocad's unfair competition, as averred above, has permitted and will permit it to make substantial sales and profits on the strength of Joby's nationwide marketing, advertising, sales and consumer recognition. Joby seeks an accounting of Tocad's profits, and requests that the Court grant Joby three times that amount in the Court's discretion.

35. As a direct and proximate result of Tocad's unfair competition, as averred above, Joby has been and will be deprived of substantial sales of its flexible camera tripods in an amount as yet unknown but to be determined at trial, and has been and will be deprived of the value of its Gorillapod® design as a commercial asset, in an amount as yet unknown but to be determined at trial. Joby seeks its actual damages, and requests that the Court grant Joby three times that amount of its actual damages in the Court's discretion.

36. Joby has no adequate remedy at law for Tocad's continuing violation of its rights as set forth above. Joby seeks preliminary and permanent injunctive relief.

37. Pursuant to 15 U.S.C. § 1118, Joby asks the Court for an order forcing Tocad to deliver up for destruction all labels, signs, prints, advertisements, and other materials in the possession of Tocad that infringe upon Joby's rights.

THIRD CLAIM FOR RELIEF

(Unfair Competition, California Business and Professions Code)

38. Paragraphs 1 - 37 above are hereby incorporated by reference as if fully set forth in this claim.

39. By marketing, advertising, promoting and using the Gorillapod® design, Tocad has engaged in unfair competition including unlawful, unfair and fraudulent business practices, in violation of Joby's rights and in violation of California Business and Professions Code Sections 17200 through 17208.

40. Tocad's use of Joby's Gorillapod® design is in violation and derogation of Joby's rights and is likely to cause confusion, mistake and deception among purchasers and the public as to the source, origin, sponsorship, or quality of Tocad's flexible camera tripods, thereby causing loss, damage and injury to Joby and to the purchasing public.

41. Tocad knew, or by the exercise of reasonable care should have known, that its adoption, commencement of use in commerce and continuing use of the Gorillapod® design in connection with its flexible camera tripod would cause confusion, mistake, or deception among purchases, users and the public.

42. Upon information and belief, Tocad knew of Joby's prior use of the Gorillapod®

1 design, and by adopting, commencing to use, and continuing to use the Gorillapod® design,
2 Tocat intended to and did induce and intends to and will induce customers to purchase its flexible
3 camera tripod products by trading off the extensive goodwill built up by Joby in its Gorillapod®
4 design.

5 43. Upon information and belief, the foregoing conduct by Tocat has been knowing,
6 deliberate, willful, intended to cause confusion, or to cause mistake or to deceive, and in disregard
7 of Joby's rights.

8 44. As a direct and proximate result of Tocat's wrongful conduct, as averred above,
9 Joby has been and will be deprived of substantial sales of its flexible camera tripods in an amount
10 as yet unknown but to be determined at trial, and has been and will be deprived of the value of its
11 Gorillapod® design as a commercial asset, in an amount as yet unknown but to be determined at
12 trial. Joby seeks an accounting and restitution from Tocat in an amount to be determined at trial.

13 45. As a direct and proximate result of Tocat's violation of California Business and
14 Professions Code Sections 17200 through 17208, Joby has suffered and will continue to suffer
15 irreparable harm, including, but not limited to, harm to its business reputation and goodwill. Joby
16 has no adequate remedy at law for Tocat's continuing violation of its rights as set forth above.
17 Joby seeks preliminary and permanent injunctive relief.

18 **FOURTH CLAIM FOR RELIEF**

19 **(False Advertising, California Business and Professions Code)**

20 46. Paragraphs 1 - 45 above are hereby incorporated by reference as if fully set forth in
21 this claim.

22 47. Tocat's conduct, as averred above, includes the making of false or misleading
23 representations or statements of fact that are likely to cause confusion, mistake or deception
24 among purchasers, users and the public as to the nature, characteristics, qualities, source, origin,
25 or sponsorship of goods, and is likely to confuse the public into believing that Joby is the source
26 or sponsor of Tocat's goods and services, thereby causing loss, damage and injury to Joby and to
27 the purchasing public in violation of California Business and Professions Code § 17500.

28 48. Tocat knew, or by the exercise of reasonable care should have known, that its

1 false advertising would cause confusion, mistake, or deception among purchases, users and the
2 public.

3 49. Upon information and belief, Toca knew of Joby's prior use of the Gorillapod®
4 design, and by adopting, commencing to use, and continuing to use the Gorillapod® design in its
5 advertising and promotions, Toca intended to and did induce and intends to and will induce
6 customers to purchase its flexible camera tripod products by trading off the extensive goodwill
7 built up by Joby in its Gorillapod® design.

8 50. Upon information and belief, the foregoing conduct by Toca has been knowing,
9 deliberate, willful, intended to cause confusion, or to cause mistake or to deceive, and in disregard
10 of Joby's rights.

11 51. As a direct and proximate result of Toca's false advertising, as averred above,
12 Joby has been and will be deprived of substantial sales of its flexible camera tripods in an amount
13 as yet unknown but to be determined at trial, and has been and will be deprived of the value of its
14 Gorillapod® design as a commercial asset, in an amount as yet unknown but to be determined at
15 trial. Joby seeks an accounting and restitution from Toca in an amount to be determined at trial.

16 52. As a direct and proximate result of Toca's false advertising, Joby has suffered
17 and will continue to suffer irreparable harm, including, but not limited to, harm to its business
18 reputation and goodwill. Joby has no adequate remedy at law for Toca's continuing violation of
19 its rights as set forth above. Joby seeks preliminary and permanent injunctive relief.

20 **FIFTH CLAIM FOR RELIEF**

21 **(Common Law Unfair Competition)**

22 53. Paragraphs 1 - 52 above are hereby incorporated by reference as if fully set forth in
23 this claim.

24 54. By marketing, advertising, promoting and using the Gorillapod® design, Toca
25 has engaged in unfair competition including unlawful, unfair and fraudulent business practices, in
26 violation of Joby's rights and in violation of common law of the State of California.

27 55. Toca's use of Joby's Gorillapod® design is in violation and derogation of Joby's
28 rights and is likely to cause confusion, mistake and deception among purchasers and the public as

1 to the source, origin, sponsorship, or quality of Tocad's flexible camera tripods, thereby causing
2 loss, damage and injury to Joby and to the purchasing public.

3 56. Tocad knew, or by the exercise of reasonable care should have known, that its
4 adoption, commencement of use in commerce and continuing use of the Gorillapod® design in
5 connection with its flexible camera tripod would cause confusion, mistake, or deception among
6 purchases, users and the public.

7 57. Upon information and belief, Tocad knew of Joby's prior use of the Gorillapod®
8 design, and by adopting, commencing to use, and continuing to use the Gorillapod® design,
9 Tocad intended to and did induce and intends to and will induce customers to purchase its flexible
10 camera tripod products by trading off the extensive goodwill built up by Joby in its Gorillapod®
11 design.

12 58. Upon information and belief, the foregoing conduct by Tocad has been knowing,
13 deliberate, willful, intended to cause confusion, or to cause mistake or to deceive, and in disregard
14 of Joby's rights.

15 59. Tocad's wrongful conduct, as averred above, has permitted and will permit it to
16 make substantial sales and profits on the strength of Joby's nationwide marketing, advertising,
17 sales and consumer recognition. Joby seeks disgorgement of Tocad's profits due to this unfair
18 competition.

19 60. As a direct and proximate result of Tocad's wrongful conduct, as averred above,
20 Joby has been and will be deprived of substantial sales of its flexible camera tripods in an amount
21 as yet unknown but to be determined at trial, and has been and will be deprived of the value of its
22 Gorillapod® design as a commercial asset, in an amount as yet unknown but to be determined at
23 trial. Joby seeks its actual and/or compensatory damages.

24 61. As a direct and proximate result of Tocad's violation of California Business and
25 Professions Code Sections 17200 through 17208, Joby has suffered and will continue to suffer
26 irreparable harm, including, but not limited to, harm to its business reputation and goodwill. Joby
27 has no adequate remedy at law for Tocad's continuing violation of its rights as set forth above.
28 Joby seeks preliminary and permanent injunctive relief.

62. Joby seeks exemplary and/or punitive damages for Tocad's intentional misconduct.

PRAYER FOR RELIEF

WHEREFORE, Joby prays for judgment in its favor and against Tocad as follows:

1. For an order from the Court, pursuant to 15 U.S.C. § 1116(a), Fed. R. Civ. P. 65, and California Business and Professions Code § 17200, *et seq.*, preliminarily and permanently enjoining and restraining Tocad, Tocad's officers, agents, servants, employees, attorneys and all others in active concert or in participation with Tocad from using Joby's Gorillapod® design, any colorable imitation of it, or any design confusingly similar to it, in connection with the promotion, sale, display, or distribution of flexible camera tripods;

2. For an order from the Court requiring that Tocad deliver up for destruction all labels, signs, prints, advertisements, and other materials that infringe Joby's statutory and common law trade dress rights, or are a result of any false designation of origin or unfair competition by Tocad;

3. For an order from the Court directing Tocad, pursuant to 15 U.S.C. §1118(a), to file with this Court and serve upon Joby within 30 days after service of the injunction, a report in writing under oath setting forth in detail the manner and form in which Tocad has complied with the injunction;

4. For an accounting of all profits received by Tocad from the sale of flexible camera tripods that infringe on Joby's statutory and common law trade dress rights and for damages sustained by Joby because of Tocad's infringement, false designation of origin and unfair competition;

5. For an award to Joby of damages in an amount equal to three times Tocad's profits;

6. For an award of actual and/or compensatory damages;

7. For an award of up to three times the amount of Joby's actual and/or compensatory damages in an amount to be determined;

8. For an award of punitive or exemplary damages in an amount to be determined;

9. For an award of Joby's costs, including reasonable attorneys' fees, of this action; and

1 10. For an order awarding Joby such other and further relief as the Court deems just and
2 proper.

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4 Dated: December 21, 2007

FENWICK & WEST LLP

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6 By: Virginia K. DeMarchi
7 Virginia K. DeMarchi

8 Attorneys for Plaintiff
9 JOBY, INC.
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JURY DEMAND

Pursuant to Fed. R. Civ. P. 38 and Local Rule 3-6, Joby demands a jury trial on all issues triable to a jury.

FENWICK & WEST LLP

By: Virginia K. DeMarchi
Virginia K. DeMarchi

Attorneys for Plaintiff
JOBY, INC.

25933/00400/LIT/1277314.6

FENWICK & WEST LLP
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Exhibit A

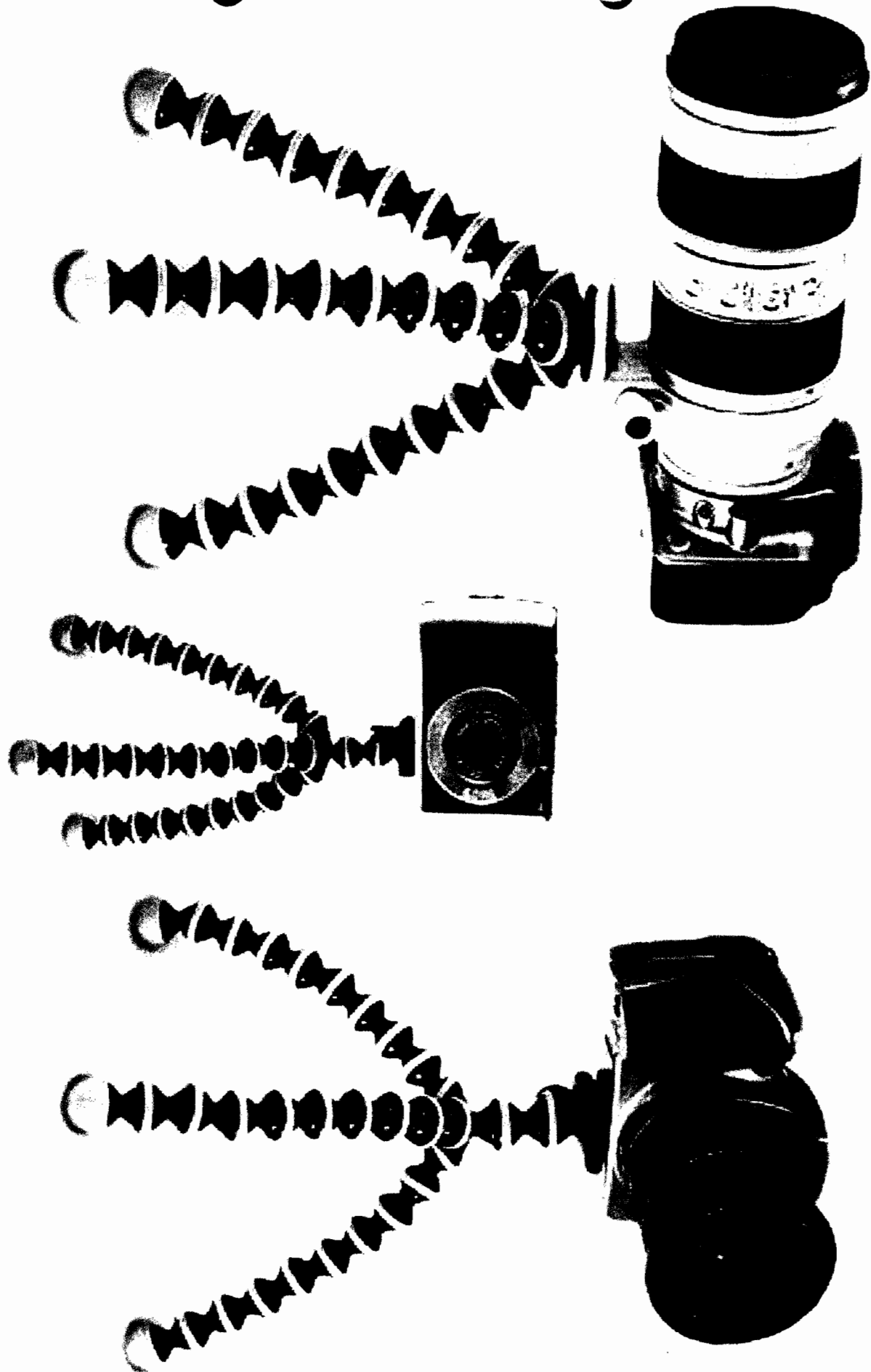


EXHIBIT A

Exhibit B

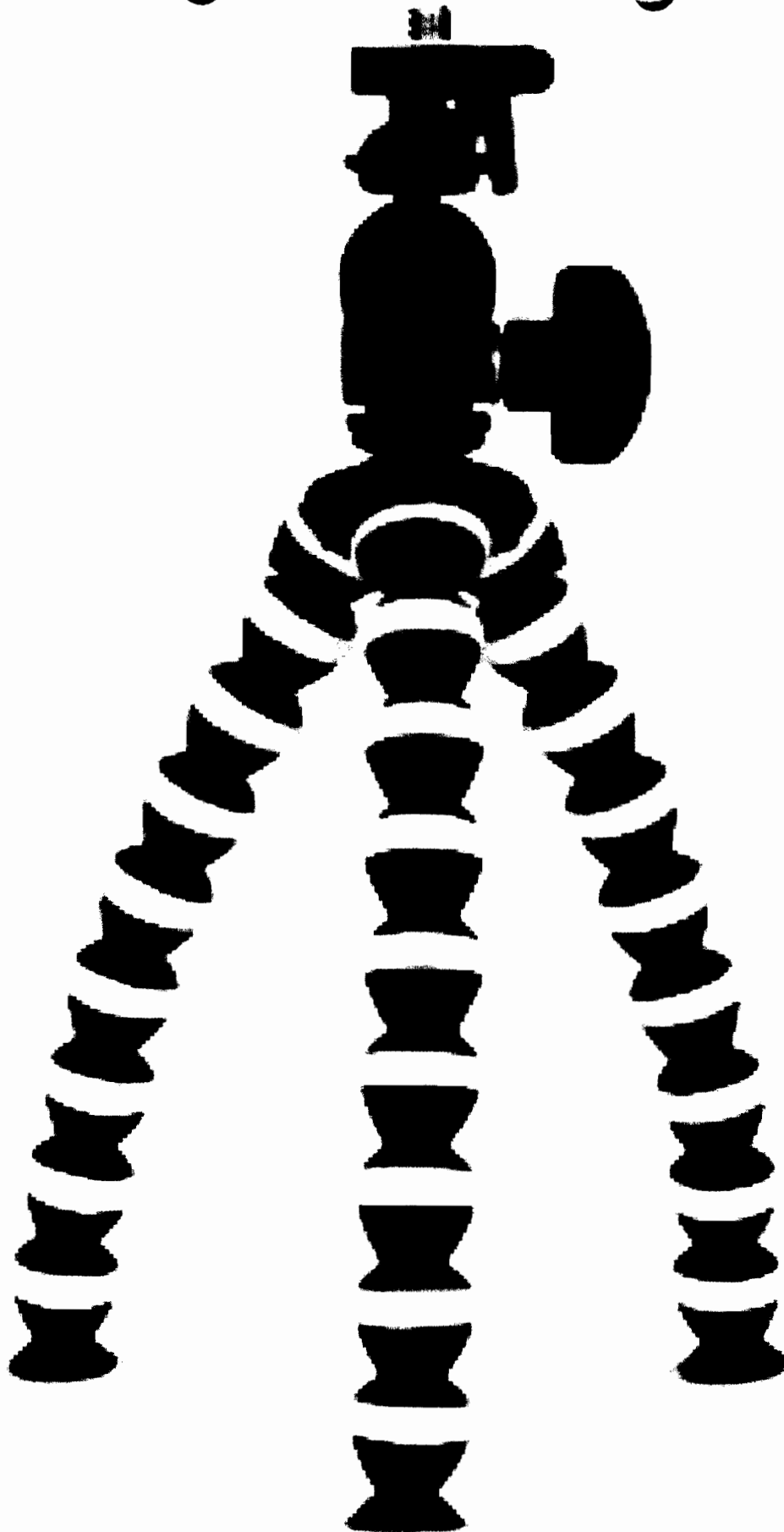


EXHIBIT B

Exhibit C

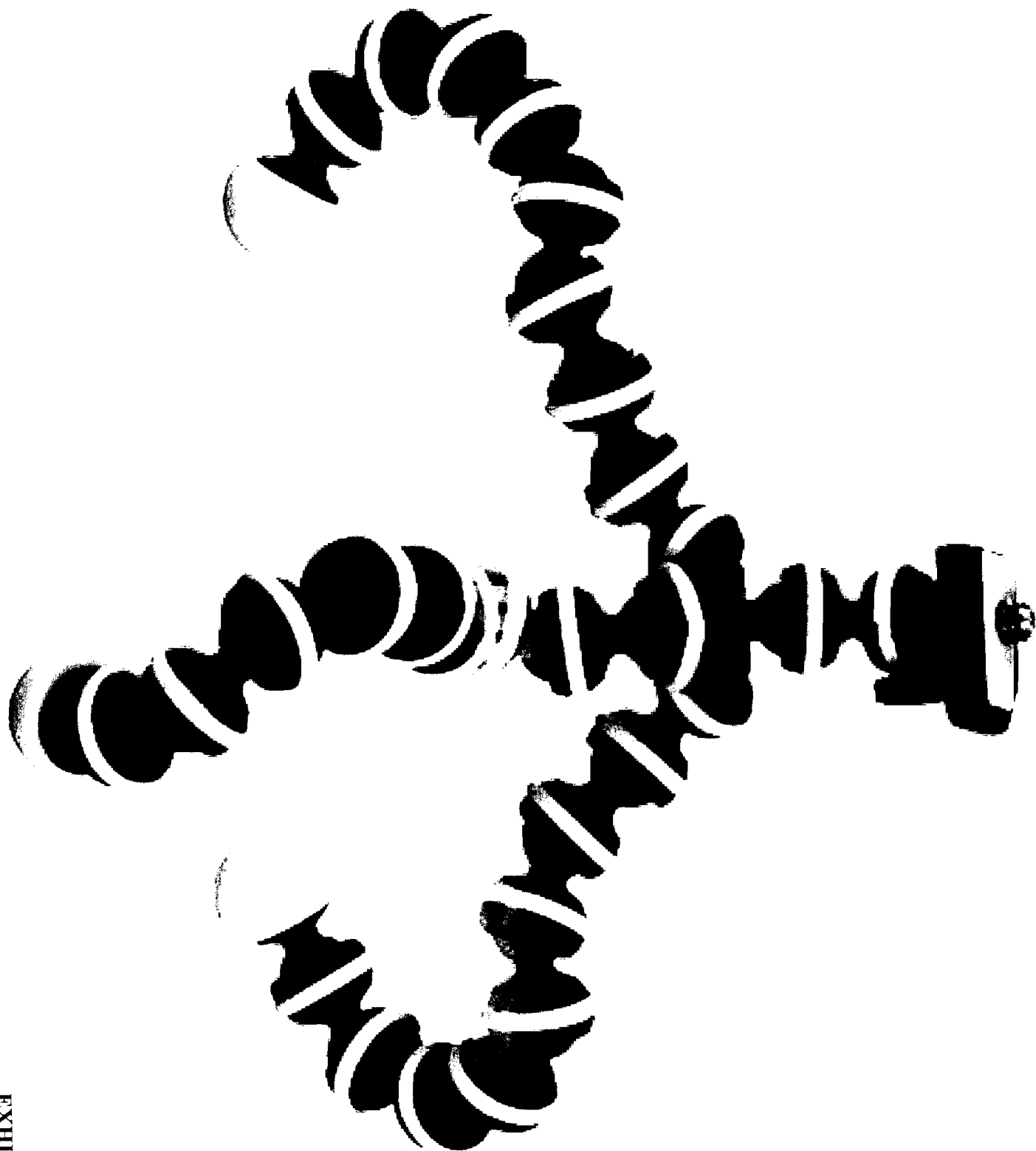


EXHIBIT C